No. 14-185

In the Supreme Court of the United States

NOEL REYES MATA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

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The court of appeals held that it lacked jurisdiction to review the decision of the Board of Immigration Appeals (Board or BIA) denying petitioner's untimely motion to reopen his removal proceedings. Pet. App. 2-3. The court reasoned that (1) its precedent required that it "construe[]" petitioner's "request for equitable tolling" of the 90-day deadline for filing a motion to reopen under 8 U.S.C. 1229a(c)(7)(C)(i) as an invitation to the Board to reopen proceedings on its *own* motion (*sua sponte*) under Board regulations, and (2) courts lack jurisdiction to review Board determinations declining to reopen *sua sponte*. Pet. App. 2-3. In light of its jurisdictional holding, the court of appeals emphasized that it did not "address the merits of [petitioner's] equitable-tolling * * * claims." *Id.* at 3.

The government's opening brief explains (at 16-28) that the court of appeals erred because it does have jurisdiction to review the Board's denial of an alien's motion to reopen under 8 U.S.C. 1229a(c)(7)(C)(i), including when the alien seeks review of the Board's denial of equitable tolling of the 90-day filing deadline. The government's brief explains (at 29-32) that the court of appeals further erred by recharacterizing the Board's equitable-tolling decision as one resolving a different question, *i.e.*, whether the Board should reopen the proceedings *sua sponte*. A remand is thus warranted to allow the court of appeals to exercise its jurisdiction to address the merits of petitioner's equitable-tolling arguments in the first instance. Gov't Br. 32-36.

The Court-appointed Amicus Curiae dedicates most of his argument to the merits of petitioner's request for tolling, arguing that the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, does not allow the 90-day statutory deadline for motions to reopen to be equitably tolled. Br. 14-34. Amicus contends (Br. 3) that this extended, "initial inquiry" into the merits is necessary to resolve "the ultimate question * * * whether the Fifth Circuit properly dismissed the petition [for review] for want of jurisdiction." Resolution of the merits of the equitable-tolling issue, the argument continues (Br. 35-40), justifies the court of appeals' decision to construe the Board's rejection of petitioner's equitable-tolling contentions as an agency decision denying *sua sponte* reopening. The latter determination, Amicus explains (Br. 40-43), is not subject to judicial review.

That analysis is erroneous. The court of appeals' *jurisdiction* to review a Board decision addressing

equitable tolling does not depend on resolving the *merits* of the equitable-tolling issue. Indeed, the court of appeals here made clear that it did not "address the merits of [petitioner's] equitable-tolling * * * claims." Pet. App. 3. This Court thus granted certiorari on the limited question whether the court of appeals had "*jurisdiction* to review Petitioner's request that the Board equitably toll" his filing deadline. See Pet. i (emphasis added). Moreover, a court conducting judicial review of an agency order is not free to reformulate the basis for the agency's decision as the Fifth Circuit did here. The court's task on review is to assess "the propriety of [agency] action solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*); accord *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (*Chenery I*). Because the court of appeals did have jurisdiction to review the Board's denial of equitable tolling as part of reviewing the Board's denial of reopening, but failed to address petitioner's arguments that the Board erred in denying equitable tolling, this Court should reverse and remand for further proceedings.

A. The Court Of Appeals' Jurisdiction Does Not Depend On Its Resolution Of The Merits Of The Equitable-Tolling Issue

The fundamental premise of Amicus's argument (Br. 3) is that the court of appeals' jurisdiction to review the Board's equitable-tolling decision depends on the outcome of the merits, *i.e.*, on whether the 90-day deadline for an alien to file a motion to reopen "is subject to equitable tolling" under the INA. That premise is incorrect.

"Jurisdiction is power to declare the law." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)

(quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). It is therefore well settled that a court lacks authority "to pronounce upon the meaning * * * of a state or federal law" when it lacks jurisdiction, and that "to do so is, by very definition, for [the] court to act ultra vires." *Id.* at 101-102. It follows that a court's determination of its own "subject-matter jurisdiction necessarily *precedes* a ruling on the merits," not vice versa. *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (emphasis added). Cf. *id.* at 584-585 (explaining that a court need not resolve whether it has subject-matter jurisdiction when it can rule on other "threshold grounds for denying audience to a case on the merits").

Amicus contends (Br. 37), however, that if the filing deadline for petitioner's "motion to reopen cannot be equitably tolled" under the INA, then "petitioner's only route to relief" before the Board would have been to suggest that the Board exercise its distinct authority to reopen his case on its own motion (because no deadline applies to the Board's own exercise of its *sua sponte* reopening authority). And a determination not to reopen *sua sponte*, Amicus continues (Br. 40-43), is not subject to judicial review. But the court of appeals' *jurisdiction* to review the Board's denial of petitioner's motion to reopen does not turn on whether petitioner's request for equitable tolling should fail on the merits. Even if the court of appeals were to conclude—contrary to every court of appeals to have resolved the issue (see Gov't Br. 33 & n.12)—that the 90-day deadline for filing a motion to reopen is *not* subject to equitable tolling, that conclusion would merely provide a basis for *upholding* the Board's denial of reopening *on the merits*, *i.e.*, for ruling that

the Board's denial of the alien's untimely motion to reopen was not erroneous. See *id.* at 31-32.

Amicus's argument that the court of appeals' jurisdiction turns on the availability of equitable tolling before the Board is also inconsistent with the decision under review. Petitioner argued below that the deadline for filing his motion to reopen was subject to equitable tolling, Pet. C.A. Br. 7-15, but the Fifth Circuit recognized that it could not resolve the merits of those arguments if it lacked jurisdiction over his petition for review. The court thus emphasized that it did not "address the merits of [petitioner's] equitable-tolling * * * claims" because it had determined that it "lack[ed] jurisdiction to review the [Board's] denial of [petitioner's] untimely motion to reopen." Pet. App. 3.

Moreover, the Fifth Circuit has yet to resolve in a precedential decision whether equitable tolling applies in this context. Although Amicus asserts (Br. 2, 10) that Fifth Circuit "precedent" holds that an alien's reopening "deadline cannot be equitably tolled," no such binding precedent exists. Amicus apparently relies (Br. 10) on the Fifth Circuit's unpublished (and unexplained) disposition in *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (2008) (per curiam). See Gov't Br. 34. But that decision, like every unpublished Fifth Circuit decision issued after 1995, is "not precedent." 5th Cir. R. 47.5.4; see *Poliner* v. *Texas Health Sys.*, 537 F.3d 368, 381 n.44 (5th Cir. 2008), cert. denied, 555 U.S. 1149 (2009). Moreover, even if such unpublished decisions were precedential, the Fifth Circuit's earlier, unpublished "hold[ing] that the doctrine of equitable tolling applies" to an alien's reopening deadline, *Torabi* v. *Gonzales*, 165 Fed. Appx. 326, 331 (2006) (per

curiam); see Gov't Br. 34—not the subsequent panel decision in *Lin*—would be the relevant circuit precedent. See *United States* v. *Ocean Bulk Ships, Inc.*, 248 F.3d 331, 340 n.2 (5th Cir. 2001) (explaining that "the holding of the first panel to address an issue is the law of th[e] Circuit" and "bind[s] all subsequent panels" until overruled en banc or by this Court) (citation omitted), cert. denied, 534 U.S. 1065 (2001). Accordingly, as previously explained (Gov't Br. 35-36 & n.14), the Fifth Circuit has yet to resolve whether the deadline for an alien to file a motion to reopen may be equitably tolled.

Since 2008, the Fifth Circuit's precedent has required Fifth Circuit panels (a) to "construe" a request to equitably toll the deadline for an alien's motion to reopen as a suggestion that the Board reopen proceedings on its own motion, and then (b) to dismiss a challenge to the Board's denial of reopening because the denial of *sua sponte* reopening is not subject to judicial review. *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008). Although Amicus asserts (Br. 14 n.2) that the "premise" for the Fifth Circuit's "construal rule" is that equitable tolling is unavailable, the Fifth Circuit has never adopted that view in a published decision. See Gov't Br. 35-36. In fact, in unpublished decisions after *Ramos-Bonilla* in which the Fifth Circuit has assumed *arguendo* that it had "jurisdiction to review the [Board]'s denial of equitable tolling," the court has upheld the Board's decisions not on the ground that tolling is unavailable, but on the basis that the alien failed to show "the type of due diligence" required for equitable tolling, *Ibarra-Gonzalez* v. *Holder*, 542 Fed. Appx. 341, 342 (2013) (per curiam), or failed to satisfy the *Lozada* require-

ments[1] for establishing an underlying claim of counsel ineffectiveness, *Gotora* v. *Holder*, 567 Fed. Appx. 219, 222 n.1 (2014) (per curiam).

In short, Amicus errs in concluding that the jurisdictional question presented in this case turns on the resolution of the merits. That contention incorrectly puts the merits cart before the jurisdictional horse and cannot be reconciled with the Fifth Circuit's own recognition that it lacks authority to determine whether equitable tolling is available if it lacks jurisdiction to review the Board's denial of such tolling.

B. The Court Of Appeals Erred In Recharacterizing The Board's Equitable-Tolling Decision As A Decision Addressing Only *Sua Sponte* Reopening

Even assuming *arguendo* that an alien's reopening deadline is never subject to equitable tolling, the Fifth Circuit erred in "constru[ing]" petitioner's motion to the Board to reopen proceedings by equitably tolling the 90-day deadline as a request to the Board to reopen proceedings on its own motion, Pet. App. 2a. That artificial recharacterization of the basis for the Board's decision contravenes settled principles governing judicial review of agency orders. See Gov't Br. 29-31.

1. This Court has long recognized the "fundamental rule of administrative law" that a court conducting judicial review of agency action "must judge the propriety of [that] action solely by the grounds invoked by the agency." *Chenery II*, 332 U.S. at 196; see, *e.g.*, *Burlington Truck Lines, Inc.* v. *United States*, 371

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[1] See Gov't Br. 25-26 (discussing the requirements in *In re Lozada*, 19 I. & N. Dec. 637, 638-640 (B.I.A. 1988), for establishing counsel ineffectiveness).

U.S. 156, 168-169 (1962) ("*Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself."); *Chenery I*, 318 U.S. at 87-88 (holding that "an administrative order must be judged [by the grounds] upon which the record discloses that [the agency] action was based" and that a court must therefore confine its "review to a judgment upon the validity of the grounds upon which the [agency] itself based its action"). That rule of judicial review is so fundamental that this Court has twice summarily reversed the Ninth Circuit when it sought to resolve an alien's petition for review on grounds different than those addressed by the Board. See *Gonzales* v. *Thomas*, 547 U.S. 183, 186-187 (2006) (per curiam); *INS* v. *Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam).

Amicus does not appear to dispute that principle. Amicus instead argues (Br. 39-40) that the *Chenery* rule "only 'pertains to the basis that a court may use for the affirmance of agency action that is reviewable' and 'has nothing whatever to do with whether agency action is reviewable.'" Br. 39 (quoting *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987)) (emphasis omitted). Although Amicus is correct that the *Chenery* rule does not itself address whether agency action is reviewable, that point lends no support to the court of appeals' decision in this case.

In *Locomotive Engineers*, this Court addressed a statutory provision that expressly authorized an interested party to "petition [the Interstate Commerce Commission (ICC)] to reopen and reconsider an action of the Commission" in certain rail-carrier proceedings. 482 U.S. at 278 (quoting 49 U.S.C. 10327(g) (1982) (repealed 1995)). The Court concluded that

although a party could obtain limited APA review of the agency's denial of a petition for "reopening on the basis of new evidence or changed circumstances," *id.* at 278, 284, no review was available if the agency "refus[ed] to reconsider [its action] for material error" because such a decision on reconsideration is "'committed to agency discretion by law,'" *id.* at 282, 284 (quoting 5 U.S.C. 701(a)(2)). In so ruling, the Court explained that although *Chenery* requires a reviewing court to limit its review to "the basis the agency used" to justify its action, the *Chenery* rule "has nothing whatever to do with whether agency action is reviewable" and, thus, did not support the (erroneous) view that "[agency] action becomes reviewable" "if the agency gives a 'reviewable' reason for [an] otherwise unreviewable action." *Id.* at 283 (emphasis omitted).[2]

That understanding of the *Chenery* rule has no application here. To be sure, the *Chenery* rule does not directly address whether the Board's denial of an

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[2] The Court illustrated its point by explaining that a prosecutor's "failure to prosecute an alleged criminal violation" based on the belief that "the law will not sustain a conviction" is not subject to review, even though the prosecutor's legal rationale is "an eminently 'reviewable' proposition, in the sense that courts are well qualified to consider the point." *Locomotive Eng'rs*, 482 U.S. at 283. The same holds true when the Board declines to reopen a case on its own motion. Just as a citizen has no right to compel a prosecutor to pursue criminal charges or to obtain judicial review of the prosecutor's decision not to do so, see *ibid.*; see also *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973), the regulation recognizing the Board's *sua sponte* reopening authority confers no private right to compel the Board to make its *own* motion to reopen the proceedings and no cognizable right to obtain judicial review of the Board's determination not to do so. See Gov't Br. 35 n.13. Both types of action are committed to agency discretion. See p. 21, *infra*.

alien's request to equitably toll the reopening deadline is subject to judicial review. But it does require that a reviewing court restrict its review of the Board's decision to the "grounds invoked by the agency." *Chenery II*, 332 U.S. at 196. Even Amicus acknowledges (Br. 39) that a court may not "affirm" agency action on grounds on which the agency might have, but did not, base its decision. The Fifth Circuit has disregarded that basic rule of administrative law by "constru[ing]" (Pet. App. 2a) the Board's denial of equitable tolling as something that it was not: an agency determination not to reopen proceedings *sua sponte*.

2. Amicus argues (Br. 39) that the court of appeals' "construal" rule is permissible because there is "no question that the Board treated petitioner's [reopening] motion as an invitation to reopen on the Board's [own] motion." But that misses the point. The Board, as it often does, *both* resolved the merits of petitioner's motion to reopen, which sought equitable tolling of petitioner's filing deadline, *and* additionally considered whether to reopen the proceedings on its own motion. See Gov't Br. 10-11, 30-31 & n.11. Although the government agrees that the court of appeals lacked authority to review the Board's decision not to exercise its *sua sponte* reopening authority, that conclusion does not justify the Fifth Circuit's decision to disregard the Board's *distinct* ruling on petitioner's motion to reopen by treating the Board's decision as merely considering whether to accept an invitation to reopen the proceedings on its own motion.

3. Amicus explains (Br. 35-37) that when a litigant files a claim, petition, or motion with a court, the court may possess authority to construe the litigant's contentions in a manner favorable to the litigant. That

practice, however, does not authorize a court conducting judicial review of agency action to disregard the very basis on which the agency expressly resolved a motion filed in agency proceedings.

This Court's decision in *Locomotive Engineers* does not suggest otherwise. As Amicus recognizes (Br. 36-37), *Locomotive Engineers* concluded that a court could review the ICC's denial of a petition (*i.e.*, motion) that "sought reopening on the basis of new evidence or changed circumstances," but that no judicial review was available of an ICC order denying a petition seeking "reconsider[ation] for material error" because that particular determination was committed to agency discretion by law within the meaning of 5 U.S.C. 701(a)(2). See 482 U.S. at 282, 284. In that limited sense, *Locomotive Engineers* concluded that the availability of APA review can depend on the "basis on which the 'petition * * * sought [relief].'" Amicus Br. 36-37 (quoting 482 U.S. at 284). But nothing in *Locomotive Engineers* suggests that the reviewing court could have "construed" the agency's resolution of a motion to reopen on the basis of new evidence (which was subject to review) as an agency denial of a motion for reconsideration based on material error (which was not). The bedrock rule of administrative law reflected in *Chenery* is that a reviewing court must review agency action on its own terms. The Fifth Circuit failed to do so here.

If the court of appeals had correctly reviewed the Board's denial of equitable tolling on its own terms rather than "construing" the Board's decision as one involving only the denial of *sua sponte* reopening, the court would have had no basis for dismissing this case for want of jurisdiction. The only basis for the court's

jurisdictional holding was that a decision by the Board denying *sua sponte* reopening is not subject to review. No similar jurisdictional hurdle exists when a court reviews the Board's denial of equitable tolling.

C. The Merits Of Petitioner's Equitable-Tolling Arguments Are Not Before This Court

1. The question presented to this Court is whether the court of appeals erred by holding that it lacks "jurisdiction to review Petitioner's request that the Board equitably toll the 90-day deadline on his motion to reopen as a result of ineffective assistance of counsel under 8 C.F.R. § 1003.2(c)(2)." Pet. i. That question should be resolved in the affirmative for the reasons given above. The separate issue on the merits—whether the Board has discretion to equitably toll the deadline for an alien to file a motion to reopen—lies outside the question presented, which does not turn on the merits of this case. As a result, the merits issues that Amicus has briefed (at 14-34) are simply not before this Court.

Amicus cites this Court's Rule 15.2 to suggest (Br. 14 n.2) that the government has waived its argument that the issue whether petitioner's reopening deadline is subject to equitable tolling is not properly before the Court, because the government did not make that argument before certiorari was granted. That is incorrect. Rule 15.2 provides that "[a]ny [nonjurisdictional] objection to consideration of a *question presented* based on what occurred in the proceedings below * * * may be deemed waived unless called to the Court's attention in the brief in opposition." (emphasis added). The Question Presented in this case, however, is expressly limited to the question of the court of appeals' "jurisdiction." Pet. i. The govern-

ment had no objection to the question on which review was sought, and no obligation to root out statements in the certiorari petition that may have strayed beyond the question that petitioner himself presented. Any other rule would encourage future petitioners to embed similar statements in the body of their certiorari petitions in an attempt to have this Court resolve numerous issues that would lie beyond the petitioners' own formulations of the Questions Presented.

Amicus notes (Br. 14 n.2) that the body of petitioner's certiorari petition not only addressed jurisdiction but also discussed the merits of the equitable-tolling issue. That additional discussion, however, does not alter the question that petitioner himself formulated and presented to this Court for review. See Pet. i. Indeed, it is settled that "the fact that petitioner discussed this issue in the text of his petition for certiorari does not bring it before [the Court]," because "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for [the Court's] review." *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (citation and brackets omitted); see Gov't Br. 32.

2. Although the question whether the Board has discretion to equitably toll the 90-day deadline for an alien to file a motion to reopen is thus not presented to this Court, the government has explained that its position is that 8 U.S.C. 1229a(c)(7)(C)(i) does not foreclose the Board from exercising such discretion to apply equitable tolling in appropriate cases. Gov't Br. 37-40. Amicus has focused the majority of his efforts (Br. 14-34) on this merits issue, which should be addressed by the court of appeals in the first instance on remand. Gov't Br. 32-36. Nevertheless, as explained

below, the government disagrees with Amicus's conclusion that the INA forecloses the Board from equitably tolling the reopening deadline.

a. Amicus argues (Br. 15-16) that Congress prohibited the Attorney General (or the Board exercising his delegated authority) from equitably tolling the 90-day deadline in 8 U.S.C. 1229a(c)(7)(C)(i) because the text of that provision specifies that the alien's motion to reopen "shall be filed" within the 90-day period and because Congress provided exceptions to the deadline that do not include an exception for equitable tolling. When viewed in its full context, however, Section 1229a(c)(7)(C) does not unambiguously prohibit the Attorney General from construing the Act to permit equitable tolling of the reopening deadline.

First, the statute is silent with respect to equitable tolling. Nothing in Section 1229a(c)(7)(C) expressly addresses whether the Attorney General may equitably toll the time to file a reopening motion.

Moreover, the statutory exceptions to the 90-day deadline reflect specific, categorical considerations that the Attorney General may reasonably conclude are distinct in kind from those advanced by equitable tolling. The statutory exceptions eliminate the reopening deadline altogether for (a) certain categories of asylum applications; (b) cases involving certain types of battered spouses, children, and parents; and (c) aliens who never received the requisite notice of the underlying removal proceedings or who could not have appeared in the removal proceedings because they were incarcerated. 8 U.S.C. 1229a(b)(5)(C)(ii) and (c)(7)(C)(ii)-(iv). Congress also increased the reopening deadline by a fixed amount (to 180 days) for certain other aliens ordered removed *in absentia*. See

8 U.S.C. 1229a(b)(5)(C)(i), (c)(7)(C)(iii), and (e)(1). Those exceptions do not speak directly to whether Congress would have intended to prohibit the Attorney General from exercising discretion to toll the 90-day deadline for aliens who have diligently pursued their rights but who confronted exceptional circumstances that prevented them from filing timely.

Moreover, if Congress had intended to foreclose the exercise of such discretion, it would not have allowed both the Department of Homeland Security (DHS) and the Board to allow the administrative reopening of proceedings after the statutory deadline had passed. Amicus acknowledges (Br. 34 n.8) that DHS may "waive the [alien's 90-day reopening] deadline." Because nothing in the relevant regulation restricts DHS's ability to "waive" that deadline, DHS may do so for any reason it deems appropriate. See 8 C.F.R. 1003.2(c)(3)(iii). Amicus further concedes that the Board has authority "'to apply *equitable tolling principles* to, and to consider the merits of, an otherwise untimely motion to reopen,'" so long as the Board does so under the rubric of exercising its "*sua sponte* authority." Amicus Br. 27 (quoting Gov't Br. 40) (emphasis added). But there is no reason to believe that Congress would have intended *to prohibit* the Board from exercising discretion to toll a reopening deadline by relying on principles of equitable tolling yet *to allow* the Board to "apply equitable tolling principles" to reach the same outcome so long as it invokes its *sua sponte* authority. That flaw in Amicus's position shows that the broader legal context governing reopening of removal proceedings undermines Amicus's contention that Congress intended to foreclose the Attorney General from allowing equitable tolling of

the statutory deadline in appropriate circumstances. See Gov't Br. 39-40.

b. i. Amicus correctly notes (Br. 27-28) that the Board has yet to issue a published decision addressing the application of equitable tolling to an alien's motion-to-reopen deadline. Cf. Gov't Br. 24 & n.8 (explaining that the Board's equitable-tolling rulings have been in non-precedential decisions).[3] But in the initial opinion in *In re Compean*, Attorney General Mukasey both noted that the courts of appeals had "h[eld] that the reopening deadline may be equitably tolled" for deficient attorney performance and independently concluded that "the Board may exercise its discretion to allow tolling of the 90-day [reopening] period * * * if the alien affirmatively shows that he exercised due diligence in discovering and seeking to cure his lawyer's alleged deficient performance." 24 I. & N. Dec. 710, 732 (A.G. 2009), vacated, 25 I. & N. Dec. 1 (A.G. 2009). Although Attorney General Holder vacated the *Compean* decision on reconsideration and directed the initiation of rulemaking to address the "framework for reviewing motions to reopen immigration proceedings based on claims of ineffective assistance of counsel," 25 I. & N. Dec. at 2; see Gov't Br. Gov't Br. 25-26 nn.9-10, the government's position here—in the absence of a precedential Board decision—is that the Board has discretion to equitably toll the

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[3] The Board has issued no published decisions analyzing the availability of equitable tolling in any immigration context, and we have identified only three of its published decisions that have used any variant of the phrase "equitable tolling." See *In re Estrada*, 26 I. & N. Dec. 180, 186 (2013); *In re J-G-*, 26 I. & N. Dec. 161, 162 (2013); *In re Assaad*, 23 I. & N. Dec. 553, 566 n.2 (2003) (Filppu, Board Member, concurring).

reopening deadline.[4] Notably, every court of appeals to have resolved the issue has held equitable tolling to be appropriate in this context. See Gov't Br. 33 & n.12.

To be clear, the government does not seek *Chevron* deference for that conclusion because no binding agency decision presently resolves the issue. Cf. Amicus Br. 28. It bears repeating, however, that the question whether the reopening deadline is subject to equitable tolling is a *merits* issue not presented in this case, which concerns only the court of appeals' jurisdiction to review the Board's decision. See pp. 12-13, *supra*. But even if the issue were presented, the appropriate course would not be for this Court to resolve that question in the first instance. Where "the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009) (quoting *Thomas*, 547 U.S. at 186).

No unusual circumstances would warrant a departure from that rule in this case. Indeed, even the court of appeals here has itself yet to resolve the merits of the equitable-tolling issue in a reasoned or precedential opinion. Gov't Br. 34-35; pp. 5-6, *supra*.

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[4] The Department of Justice is pursuing the rulemaking process that the Attorney General directed in *Compean*. The Department's notice of proposed rulemaking is currently pending review by the Office of Management and Budget. See Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, *Motions To Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel*, RIN 1125-AA68 (2015), http://www.reginfo.gov/public/do/eoDetails?rrid=125038.

Moreover, judicial resolution of issues bearing on equitable tolling without the benefit of a precedential agency decision could potentially be overtaken by subsequent regulatory action. Cf. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-985 (2005). When the Attorney General or the Board addresses in a future precedential adjudicatory decision or rulemaking proceeding whether and to what extent equitable-tolling principles apply in this context, the agency would not be bound to follow exactly the tolling rules that have been adopted for court proceedings. The agency could instead choose to define differently the contours of the tolling standards and procedures that would apply in its own administrative adjudications. See Gov't Br. 37-39 (discussing *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), and the fundamental difference between procedural rules for agency adjudications and rules developed by courts for court proceedings). Such agency procedures could, for instance, specify the type of prejudice from counsel ineffectiveness that an alien would have to show to justify tolling, or could establish an outer time limit on the availability of tolling. Cf. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 821, 828 (2013) (upholding an agency regulation imposing a three-year maximum "good cause" extension of a 180-day statutory deadline to file an administrative appeal).

ii. Amicus incorrectly asserts (Br. 31-32) that the government has "change[d] its interpretation" after rejecting "the availability of equitable tolling" in earlier rulemaking proceedings. In April 1996, before Congress enacted 8 U.S.C. 1229a(c)(7)(C), the Attorney General concluded in rulemaking proceedings that

"a 'good cause exception' would [not] be an appropriate procedural mechanism" for extending an alien's reopening deadline under the Department's regulations, and she noted that the Board's authority to reopen cases *sua sponte* was "a mechanism" that may be used to address certain cases presenting exceptional circumstances. 61 Fed. Reg. 18,902 (Apr. 29, 1996). That rejection of a "good cause" standard did not resolve the distinct question whether 8 U.S.C. 1229a(c)(7)(C)—which Congress enacted five months *later* in September 1996[5]—must be construed to foreclose the Board from exercising discretion to equitably toll an alien's reopening deadline.

A "good cause" standard applies in numerous contexts. See, *e.g.*, Fed. R. Civ. P. 4(m) (extension of deadline to serve process), 6(b)(1) (extension of deadlines set forth in the Federal Rules of Civil Procedure, local rules, and certain statutes), 26(a)(3)(B) (extension of deadline for certain discovery objections). And although its meaning may vary somewhat based on the particular context and "procedures involved," the phrase "good cause" generally refers to a "[l]egally sufficient ground or reason" the determination of which is left "largely in the [tribunal's] discretion." *Black's Law Dictionary* 692 (6th ed. 1990). As a result, a "good cause" standard often encompasses a broad spectrum of reasons deemed sufficient to warrant an extension of time. See, *e.g.*, 4B Charles Alan Wright et al., *Federal Practice and Procedure* § 1165, at 608 (2015) (explaining that courts will normally

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[5] See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-593 (adding 8 U.S.C. 1229a(c)(6)(C) (2000), which is now designated as Section 1229a(c)(7)(C)).

grant extensions under Rule 6(b) "in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party"); see also *Pace* v. *DiGuglielmo*, 544 U.S. 408, 416 (2005) ("A [habeas] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court.").

The traditional equitable-tolling standard, by contrast, is much more circumscribed. It applies "only" when the party seeking tolling has demonstrated that (1) "'he has been pursuing his rights diligently'" and (2) "'some extraordinary circumstance [both] stood in his way' and prevented timely filing." *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace*, 544 U.S. at 418); see *Pace*, 544 U.S. at 416, 418 (separately addressing "good cause" and "equitable tolling"); see also, *e.g.*, *Livingston Powdered Metal, Inc.* v. *NLRB*, 669 F.2d 133, 136 (3d Cir. 1982) ("good cause" standard is "less stringent" than an "'extraordinary circumstances' test"); *NLRB* v. *Zeno Table Co.*, 610 F.2d 567, 569 (9th Cir. 1979) (similar).

This Court has concluded that a court's authority to grant relief under a "good cause standard does not by itself necessarily imply that any other reason for [the same relief]—for example, on the basis of traditional equitable principles—is precluded." *Miller* v. *French*, 530 U.S. 327, 340 (2000). The Attorney General's determination that a "good cause exception" was unwarranted under regulations governing reopening similarly does not imply that the subsequently enacted Section 1229a(c)(7)(C)(i) must be construed to foreclose the Attorney General from allowing equitable tolling for a more limited set of cases. Nor did the Attorney General's description in those earlier rule-

making proceedings of the Board's *sua sponte* reopening authority as "a mechanism" for addressing certain cases suggest it is the only mechanism Section 1229a(c)(7)(C)(i) allows for addressing otherwise untimely reopening requests.

3. Finally, we note that the government agrees with Amicus—and all 11 courts of appeals with jurisdiction to review the Board's decisions—that the Board's decision not to reopen proceedings on its *own* motion is not subject to judicial review. See Gov't Br. 35 n.13; Amicus Br. 40-43. The Board's *sua sponte* reopening regulation (8 C.F.R. 1003.2(a)) confers no private right either to seek or to compel the Board to make its *own* motion to reopen proceedings. A Board determination declining to act on its own motion in any particular proceeding is an action committed to agency discretion by law, regardless of the Board's legal rationale for its determination. See p. 9 & n.2, *supra* (discussing *Locomotive Eng'rs*, *supra*). Moreover, the absence of judicially manageable standards for judging the Board's refusal to act *sua sponte* to reopen proceedings independently reinforces the conclusion that such decisions are not subject to judicial scrutiny. See *Locomotive Eng'rs*, 482 U.S. at 283 ("[T]he impossibility of devising an adequate standard of review" "confirm[s]" that agency action is not subject to review.); Gov't Br. 35 n.13.

But this case does not involve *sua sponte* reopening. As Amicus acknowledges (Br. 40 n.10), petitioner expressly disclaimed any argument that the Board's denial of *sua sponte* reopening is subject to judicial review. The certiorari petition makes clear that petitioner did not "disagree[]" with the Fifth Circuit's holding "that the Board's *sua sponte* discretion is un-

reviewable," and that petitioner "only * * * disagrees" with the court of appeals' independent conclusion that "a request for equitable tolling is equivalent to a request for *sua sponte* power." Pet. 6. Although petitioner may have since reconsidered that concession, see Pet. Br. 26-27 (suggesting that the Board's denial of *sua sponte* reopening may be subject to review), petitioner has affirmatively waived any contrary position in this Court.

In the end, this case boils down to one simple point: The court of appeals erred in construing the Board's denial of petitioner's reopening motion, which sought equitable tolling of petitioner's filing deadline, as a different type of Board determination about whether to reopen proceedings on the Board's own motion.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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Solicitor General

APRIL 2015

REPLY BRIEF

No. 14-185

IN THE

Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
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FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The question presented is one of jurisdiction: whether the Fifth Circuit has power to review the BIA's rejection of Mr. Mata's request for equitable tolling of the 90-day statutory period for moving to reopen removal proceedings on grounds of ineffective assistance of counsel. Pet. i. As the government and every other circuit to decide the question agree, the answer to that question is yes—an answer compelled by the governing jurisdictional statutes, this Court's decision in *Kucana* v. *Holder*, 558 U.S. 233 (2010), and the presumption of judicial review of agency action.

The Court-appointed Amicus embraces many of these principles. *E.g.*, Amicus Br. 2 ("Courts generally have jurisdiction to review the Board's denial of a statutory motion to reopen." (citing *Kucana*)); *id.* 17 (agreeing that the 90-day deadline "is not jurisdictional"). Amicus's argument for affirmance depends on changing the question presented to the *merits* question whether the 90-day filing period can be tolled, which Amicus urges be answered in a manner contrary to the position of the BIA, the government, and all courts of appeals that have addressed the matter. Even if the Court reaches the availability of tolling, reversal is still warranted.

THE COURT OF APPEALS HAS JURISDICTION TO REVIEW THE BIA'S EQUITABLE TOLLING DETERMINATION

A. The Court Need Only Decide The Question Of Jurisdiction

Petitioner and the government have explained why the statutory provisions governing judicial review of removal orders, read in light of settled canons of interpretation, give the court of appeals jurisdiction to review BIA decisions denying motions to reopen, including decisions refusing to toll the 90-day filing period of 8 U.S.C. § 1229a(c)(7)(C)(i). *See* Pet. Br. 14-17; Resp. Br. 15-28. That is a sufficient basis for this Court to reverse the decision below. The Court need go no further.

Amicus invites the Court to decide whether "the 90-day statutory deadline for filing a motion to reopen [is] subject to equitable tolling." Br. i. That question was not presented for review, and for good reason: The Fifth Circuit ruled that it "lack[ed] jurisdiction to review" the BIA's denial of Mr. Mata's motion to reopen and that it "need not address the merits of Mr. Mata's equitable-tolling, ineffective-assistance-of-counsel, and

due-process claims." Pet. App. 3. The petition for certiorari was accordingly limited to jurisdiction. Pet. i. The general availability of equitable tolling—a proposition that the BIA decided in Mr. Mata's favor (Pet. App. 7), that the government does not dispute (Resp. Br. 23-24), and that the Fifth Circuit did not address (Pet. App. 3)—is not before the Court.[1]

Nor is the availability of equitable tolling "fairly include[d]" in this jurisdictional appeal. Amicus Br. 14 n.2. A court's jurisdiction to decide a dispute is a threshold question to be decided before and apart from the merits. *E.g.*, *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-431 (2007) ("jurisdictional questions ordinarily must precede merits determinations in dispositional order"); *Great S. Fire Proof Hotel Co.* v. *Jones*, 177 U.S. 449, 453 (1900) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.").

This Court has rejected efforts to address a question not presented in the petition, even where the petition "presuppose[d]" the answer. *Limelight Networks, Inc.* v. *Akamai Techs., Inc.*, 134 S. Ct. 2111, 2120 (2014). Therefore, even if Amicus were correct that the availability of equitable tolling formed the "premise of" the question presented (Br. 14 n.2), that would not warrant a ruling on the issue. And it is hardly clear that the Fifth Circuit's jurisdictional ruling was "premise[d]" on a view that the 90-day motion to reopen deadline can-

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[1] Contrary to Amicus's argument (Br. 14 n.2), the petition's final sentence did not "confirm[] that the scope of the question presented includes the availability of equitable tolling." That sentence was directed to "*jurisdiction* to review BIA denials of requests for equitable tolling." Pet. 26-27 (emphasis added).

not be tolled. No published Fifth Circuit decision so holds; the only precedential opinion in this area, *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008), states merely that requests for tolling are treated as requests for *sua sponte* reopening. *See Matter of Chavez-Guzman*, 2012 WL 6968959, at *1 (BIA Dec. 13, 2012) ("[T]he Fifth Circuit has not addressed in a published decision whether the motion time limitations may be equitably tolled in cases claiming ineffective assistance of counsel."). Amicus relies on language in *Lin* v. *Mukasey*, 286 F. App'x 148, 150 (5th Cir. 2008) (per curiam), stating that "equitable tolling is not a basis for filing an untimely or numerically-barred motion." *Lin* at most reveals an intra-circuit conflict in unpublished decisions regarding the availability of equitable tolling. *See Torabi* v. *Gonzales*, 165 F. App'x 326, 330-331 (5th Cir. 2006) (per curiam) (reversing the BIA's denial of equitable tolling as an abuse of discretion).

The uncertainty about the Fifth Circuit's position on the availability of equitable tolling reinforces that this is not a "most exceptional case[]" in which the Court should consider a question not clearly raised in the petition. *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 28 (1993) (per curiam); *see also Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("Ordinarily, this Court does not decide questions not ... resolved in the lower court."). The Court may therefore answer the question presented by ruling that the court of appeals had appellate jurisdiction, reversing the judgment, and remanding for consideration of Mr. Mata's appeal on the merits.[2]

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[2] Another reason to refrain from addressing the merits question in the first instance is the possibility that the issue may be resolved without this Court's intervention. On remand, the Fifth

In the event the Court chooses to go further, the merits arguments raised by Amicus are addressed in the balance of this brief.

B. The 90-Day Period Is Subject To Tolling Under Multiple Theories, Each Of Which Results In Appellate Jurisdiction To Review The BIA's Decision

Although the Court need not consider the merits of the BIA's authority to toll the 90-day period, doing so does not warrant affirmance. Reversal remains appropriate here regardless of whether the availability of equitable tolling is compelled as a matter of statutory interpretation (as we contend), is a permissible implementation of the 90-day statutory period by the BIA (as the government contends), or is an exercise of the BIA's regulatory authority to reopen proceedings *sua sponte* (as Amicus contends).

1. The 90-day deadline is subject to tolling as a matter of statutory interpretation

a. The 90-day deadline is a statute of limitations

As Petitioner showed (Br. 18), and Amicus agrees (Br. 17), the 90-day filing period for motions to reopen under 8 U.S.C. § 1229a(c)(7)(C)(i) is not jurisdictional. Such a time limit is accordingly "subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland* v. *Florida*, 560 U.S. 631, 645-646 (2010) (quoting

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Circuit could well agree with the BIA and all circuits to have addressed the matter that the 90-day deadline is subject to tolling. Furthermore, the Attorney General plans to issue a rule on the subject this year. Resp. Br. 25 n.9.

Irwin v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)).

Amicus resists application of the rebuttable presumption of equitable tolling on the theory that the 90-day period is not a "statute of limitations"—a category Amicus defines narrowly to include only provisions "govern[ing] when suit must be initiated, a claim filed, or an action brought," based on "the date when the claim accrued." Amicus Br. 21 (internal quotation marks omitted). But the Court has never defined the category of tollable statutory periods so narrowly.

In *Young* v. *United States*, 535 U.S. 43 (2002), the Court found tollable a three-year "lookback period" in the Bankruptcy Code, 11 U.S.C. § 507(a)(8)(A)(i). The lookback period was not a period in which "suit must be initiated, a claim filed, or an action brought." Amicus Br. 21. Rather, it defined the period for which the IRS may collect back taxes from a debtor who files for bankruptcy; tax debts due for years before the "lookback period" are dischargeable in bankruptcy. *See Young*, 535 U.S. at 47. The "lookback period" did not prescribe when the IRS must initiate a suit. It nonetheless qualified as a tollable "limitations period because it prescribes a period within which certain rights (namely, priority and nondischargeability in bankruptcy) may be enforced." *Id.* The lookback period was thus "presumed" to have been drafted in light of the background principle of equitable tolling. *Id.* at 49; *see also* Wood, *A Treatise on the Limitation of Actions at Law and in Equity* 1 (Moore ed., 4th ed. 1916) ("[s]tatutes of limitation are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, *or within which certain rights may be enforced*" (emphasis added)).

Young is only the most recent case in which this Court has recognized the possibility of tolling other deadlines that do not fit into Amicus's narrow definition of a statute of limitations. *See, e.g.*, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393-394 (1982) (90-day period for filing a "charge" with the EEOC in a Title VII case—a prerequisite for a later lawsuit—is "like a statute of limitations" and is "subject to waiver, estoppel, and equitable tolling"); *Irwin*, 498 U.S. at 94-96 (filing deadline that was measured not from the date the claim accrued, but from notice of final action from the EEOC, was a "time limit[]" subject to equitable tolling); *United States* v. *Locke*, 471 U.S. 84, 94 n.10 (1985) ("Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling."); *Honda* v. *Clark*, 386 U.S. 484, 493 n.8 (1967) (noting, in dicta, that dismissal of an administrative action for failure to comply with a 45-day limit to resubmit certificates of deposit "would be open to attack on lines similar to those we hold require tolling the statute of limitations").

If Amicus's narrow definition of the time periods subject to equitable tolling were correct, this Court's opinion in *Sebelius* v. *Auburn Regional Medical Center*, 133 S. Ct. 817 (2013), would have been much shorter. The deadline at issue there was the "statutory 180-day limitation" for filing an appeal from an administrative decision to another body within the agency. *Id.* at 821. That appeal period in no way defined the time to file a suit; if that were a necessary characteristic of a "statute of limitations" presumptively subject to equitable tolling, then the Court's rejection of the lower court's tolling decision could have rested on that ground alone. Instead, this Court expressly referred to the 180-day deadline as a "limitations period," *id.* at

823, and provided a detailed explanation of why that specific deadline was unlike those held presumptively subject to tolling in cases like *Irwin* and *Zipes*, *id.* at 827-828. "Such reasoning would have been gratuitous," *Zipes*, 455 U.S. at 397, if the 180-day deadline had been categorically untollable because it was not a "statute of limitations" as Amicus defines the term.

The question, therefore, is not whether the 90-day deadline of 8 U.S.C. § 1229a(c)(7)(C)(i) governs the filing of a suit, but rather whether "it prescribes a period within which certain rights ... may be enforced." *Young*, 535 U.S. at 47.[3]

The 90-day deadline for motions to reopen fits comfortably within the Court's definition. The Court has emphasized that "the statutory right to reopen," *Dada* v. *Mukasey*, 554 U.S. 1, 5 (2008), serves as "an important safeguard intended to ensure a proper and lawful disposition of immigration proceedings," *Kucana* v. *Holder*, 558 U.S. 233, 242 (2010) (internal quotation marks omitted). *See also, e.g.*, *Dada*, 554 U.S. at 15 (IIRIRA "guarantees to each alien the right to file 'one motion to reopen proceedings'"). And there is no question that the 90-day limit prescribes the time in which

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[3] Contrary to Amicus's assertion (Br. 20), this does not mean that every time period in a federal statute is presumptively subject to tolling. A deadline does not qualify if the statutory relief remains available after the deadline's expiration. *See Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1234 (2014). Neither would a statutory waiting or notice period. *See Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27-28 (1989). Moreover, not all "statutes of limitations" will be subject to tolling; if a limitations period is drafted in a "highly detailed technical manner," *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997), or is "unusually generous," *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998), tolling will be unavailable.

that "right[] ... may be enforced," *Young*, 535 U.S. at 47; after that time, absent circumstances that call for equitable relief, the statutory right to reopen is no longer available.

The purposes served by the 90-day deadline further demonstrate that it falls within this Court's definition of a presumptively tollable statute of limitations. The deadline "serves the same basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Young*, 535 U.S. at 47 (internal quotation marks omitted). Instead of allowing reopening years after the fact, the statute requires noncitizens to present any new evidence with haste. The deadline also protects the government's interest in finality. *See* Amicus Br. 34 (recognizing that the 90-day limitation provides "repose").

Accordingly, it is no surprise that every circuit to have addressed the merits question whether the 90-day deadline may be equitably tolled has concluded that it may. *See* Pet. Br. 21-22. Many of them expressly recognize the deadline as a "statute of limitations" or "limitations period." *E.g.*, *Kuusk* v. *Holder*, 732 F.3d 302, 305 (4th Cir. 2013) ("[Section] 1229a(c)(7)(C)(i) sets forth a limitations period that can be equitably tolled."); *Gaberov* v. *Mukasey*, 516 F.3d 590, 594 (7th Cir. 2008) ("The 90-day deadline is a statute of limitations and therefore subject to equitable tolling."); *Socop-Gonzalez* v. *INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc) ("Congress intended the filing period for motions to reopen to operate as a statute of limitations"); *Iavorski* v. *INS*, 232 F.3d 124, 129, 134 (2d Cir. 2000) (describing deadline as a "statute of limitations" and "limitations period"). We have located no decision that has adopted Amicus's contrary position.

b. *The presumption of equitable tolling applies to the statutory 90-day deadline*

Because the 90-day filing period for motions to reopen is a "statute of limitations" properly defined, it is "subject to a rebuttable presumption in *favor* of equitable tolling." *Holland*, 560 U.S. at 645-646 (internal quotation marks omitted). Amicus (Br. 23) and the government (Br. 37-39) resist that conclusion on the basis that this case involves an agency. But this Court has found administrative deadlines presumptively subject to equitable tolling, *see, e.g.*, *Zipes*, 455 U.S. at 393, and expressed its approval for doing so (albeit in dicta) in *Honda*, 386 U.S. at 493 n.8.

The application of equitable tolling in agency cases is no different from other situations in which equitable doctrines designed by courts have been applied to the administrative context. For example, this Court applied the "relation back" doctrine—which "has its roots in the former federal equity practice," *Scarborough* v. *Principi*, 541 U.S. 401, 418 (2004) (internal quotation marks omitted)—to hold that an EEOC charge due within a statutory period could be "verified" by the filer after the deadline. *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 115-117 (2002). The Court found "tacit" endorsement by Congress of the application of relation back in the administrative context from the fact that Congress presumably knew of "this settled judicial treatment" of verification requirements. *Id.* at 117. The Court emphasized that the distinction between courts and agencies was inconsequential for purposes of applying the equitable doctrine: "[I]f relation back is a good rule for courts of law, it would be passing strange to call it bad for an administrative agency." *Id.* at 116.

The BIA itself has a long history of applying equitable doctrines. For example, the BIA has repeatedly invoked "the more far-reaching equitable remedy of granting relief *nunc pro tunc*." *Iavorski*, 232 F.3d at 130 n.4. The pedigree of equitable *nunc pro tunc* adjudication in immigration cases dates back to *Matter of L-*, 1 I. & N. Dec. 1, 6 (A.G. 1940), in which then-Attorney General Robert Jackson ruled that the statutory authority to waive a noncitizen's inadmissibility could be exercised "*nunc pro tunc*" after the noncitizen had entered the country and was in deportation proceedings, even though the statutory provision by its terms did not apply to deportable aliens. *See also Judulang* v. *Holder*, 132 S. Ct. 476, 480 (2011). The BIA continued to grant relief *nunc pro tunc* under the 1952 Immigration and Nationality Act, finding "nothing to indicate that Congress wished to cut off this unique relief." *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1954); *see also Matter of Silva*, 16 I. & N. Dec. 26, 27 (BIA 1976).

The example of equitable *nunc pro tunc* relief refutes Amicus's contention (Br. 15) that, because Congress did not expressly mention the equitable doctrine of tolling, it must necessarily have foreclosed it. No statutory provision called for *nunc pro tunc* relief in 1940 either, yet Attorney General Jackson saw no difficulty in applying it in order to avoid a "capricious and whimsical" result. *Matter of L-*, 1 I. & N. Dec. at 5; *see also Edwards* v. *INS*, 393 F.3d 299, 308 (2d. Cir. 2004) ("The equitable remedy of *nunc pro tunc* relief has a long and distinguished history in the field of immigration law."); *Matter of Garcia-Linares*, 21 I. & N. Dec. 254, 257 (BIA 1996) (same); *Matter of S-N-*, 6 I. & N. Dec. 73, 74 (BIA 1954) (same).

There is thus no basis to categorically exclude the 90-day limitations period from the presumption of equi-

table tolling simply because an agency is involved. Not only has the Court generally approved the application of equitable principles in the administrative context, but the BIA has a long history of exercising equitable powers, a practice with which Congress is familiar. For that reason, the *Irwin* presumption applies with full force to the 90-day statutory period at issue here.

Of course, not *all* statutory deadlines governing agency proceedings are appropriately presumed to be subject to equitable tolling. *See, e.g., Auburn Reg'l*, 133 S. Ct. at 827. However, as Petitioner explained (Pet. Br. 20-21 n.8), the factors that the Court considered in *Auburn Regional* do not compel the same result with respect to the very different limitations period at issue here. Neither the government nor Amicus has developed any argument to the contrary.[4]

c. *The presumption of equitable tolling is not rebutted*

Amicus does not meaningfully contend that anything in the statute affirmatively rebuts the presumption of equitable tolling. Nor could such an argument hold up; when tolling is presumed, congressional silence on the issue is interpreted as intent to include tolling. *See Irwin*, 498 U.S. at 95-96. Certainly nothing in the statute suggests that equitable tolling was "eschewed by Congress." *Honda*, 386 U.S. at 501.

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[4] Cases holding that a *court* should not overturn an agency's proceeding "on the basis of the procedural devices employed," *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519, 548 (1978), say nothing about whether *Congress* has presumptively included the equitable concept of tolling in a statutory limitations period applicable to a right that serves "an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings," *Kucana*, 558 U.S. at 242.

Contrary to Amicus's argument (Br. 15-16), the fact that IIRIRA contains exceptions to the 90-day deadline supports the conclusion that it can be tolled. *See American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 541-542, 553 (1974) (where Clayton Act expressly suspended limitations period during certain proceedings initiated by the federal government, the "same concept leads to the conclusion that" the period was subject to tolling during other proceedings); *Avila-Santoyo* v. *U.S. Att'y Gen.*, 713 F.3d 1357, 1362 (11th Cir. 2013) (en banc) (exceptions to the 90-day reopening deadline are "indicative of a certain degree of flexibility that is inherently inconsistent with the 'jurisdictional label'"). And the IIRIRA exceptions allow later filings even in circumstances where equitable tolling would *not* be available, for instance where the noncitizen failed to pursue his or her rights diligently. *E.g.*, 8 U.S.C. § 1229a(c)(4)(C)(ii) (allowing asylum applicant to move to reopen based on evidence of "changed country conditions" not available at the original hearing, without requirement of diligence in the interim); *id.* § 1229a(c)(6)(C)(iii)-(iv) (similar rules regarding persons held removable *in absentia* and abused family members). Such exceptions "*supplement*[] rather than displace[] principles of equitable tolling." *Young*, 535 U.S. at 53.

Congress's decision to leave in place the regulations permitting the Board to reopen proceedings after the 90-day deadline further supports the conclusion that Congress intended the deadline to be tollable. The situation is comparable to *Bowen* v. *City of New York*, which involved the 60-day period for seeking judicial review of Social Security Administration decisions. 476 U.S. 467, 480-481 (1986). The Court observed that "Congress has authorized the Secretary to toll the 60-day limit" in particular circumstances, and took that as

"expressing its clear intention to allow tolling in some cases." *Id.* at 480 & n.12. Here, as in *Bowen*, "[t]he fairness concerns underlying the regulations support [the] application of equitable tolling," even in a case not expressly covered by the written tolling provisions, and "traditional equitable tolling" is "nowhere eschewed by Congress" and is "fully consistent with the overall congressional purpose." *Id.* at 480 (internal quotation marks omitted).

Indeed, allowing the 90-day deadline to be tolled not only is consistent with the statute's purpose, but actually advances it. The 90-day period is designed to encourage immigrants to pursue their rights diligently. Equitable tolling only applies when an unusual circumstance "deprives the filer, through no fault of his own, of the full period accorded by the statute." *McQuiggin* v. *Perkins*, 133 S. Ct. 1924, 1941 (2013) (Scalia, J., dissenting). In such circumstances, tolling fulfills the limitations period's purpose, because it was not a lack of diligence that caused the deadline to be missed. *See CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014) ("Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to 'pursue his rights diligently,' and when an 'extraordinary circumstance prevents him from bringing a timely action,' the restriction imposed by the statute of limitations does not further the statute's purpose." (brackets omitted)); *Bowen*, 476 U.S. at 481 (tolling "does not undermine the purpose of the ... limitations period," but rather "serves the purpose of the Act").[5]

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[5] Amicus cites floor statements addressing Members' desire to streamline the removal process. Br. 16-17 n.3. Petitioner does not dispute that goal, which was accomplished in several ways,

That the deadline for filing motions to reopen is short further cuts in favor of equitable tolling. In *United States* v. *Beggerly*, the Court cited "the unusually generous nature of the [Quiet Title Act's] limitations time period," which was 12 years, in deciding that the presumption of equitable tolling was defeated. 524 U.S. 38, 49-50 (1998). Conversely, in *Holland*, the Court found a one-year limitations period subject to tolling, explaining that "in contrast to the 12-year limitations period at issue in *Beggerly*, [the one-year] period is not particularly long." 560 U.S. at 647. The 90-day period for motions to reopen is likewise not long, which strengthens the presumption that it is subject to tolling in appropriate cases.

Finally, the application of tolling makes sense in light of the interests at stake. Rigid adherence to the 90-day deadline would deny immigrants any effective review of their claims, through no fault of their own. This Court "ha[s] long recognized that deportation is a particularly severe 'penalty,'" *Padilla* v. *Kentucky*, 559 U.S. 356, 365 (2010), and motions to reopen removal proceedings provide the only mechanism for agency and judicial review of new evidence, a factor that sets this motion apart from many others made in civil litigation. The 90-day deadline thus represents exactly the type of statutory limitation period to which equitable

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including by reducing the time to file and number of available motions to reopen. But that in no way suggests that Congress meant to foreclose the application of equitable tolling where exceptional circumstances deprived the noncitizen of the ability to exercise his statutory right within the prescribed period. *See Holland*, 560 U.S. at 648-649 (while a primary purpose of the statute may be to eliminate delays in the review process, it would not be reasonable to interpret it as "seek[ing] to end every possible delay at all costs").

tolling should and does apply in appropriate circumstances.

2. Even if the statute did not require equitable tolling, the BIA's decision to apply it was proper

As the government argues (Resp. Br. 14, 37), regardless of whether the *Irwin* presumption applies here, the BIA's decision that the 90-day deadline is subject to equitable tolling was proper. Amicus opposes the BIA's recognition of equitable tolling on two grounds, neither of which is persuasive.

a. Amicus's claim that the statute unambiguously *prohibits* tolling (Br. 25) is unsupported, as the statute says nothing about whether tolling should or should not apply. At most, Amicus has identified statutory silence, which does not support affirmance here. If the result of silence is not that equitable tolling presumptively *applies*—as it should be, *see supra* pp. 5-16—then at the very least it constitutes a gap that the BIA may fill. *See, e.g.*, *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1604 (2014) ("we read Congress' silence as a delegation of authority to [the agency] to select from among reasonable options").

Amicus essentially concedes (Br. 35) that the statute does not prohibit tolling by recognizing that the BIA may apply "principles of equitable tolling" through its regulatory authority to reopen proceedings *sua sponte*. If Amicus were correct that the statute's 90-day deadline were so strict that "there is no room for deference" (*id.* 25), then it would be hard to see how a *regulation* could give the BIA the authority to apply "principles of equitable tolling" that the statute supposedly foreclosed.

b. Amicus next contends (Br. 27) that, even if the BIA has administrative leeway to decide that the 90-day period can be tolled, it has in fact "not done so." But the BIA did just that in this case. Pet. App. 7 ("[T]he time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel."); *see also* Resp. Br. 2. It has done likewise in many other cases. Resp. Br. 24-27. The government accordingly attests (*id.* 37) that the agency "has permissibly incorporated [equitable] tolling into its procedures implementing the INA's administrative removal process."

Amicus takes issue with the fact that the BIA has so far advanced its equitable tolling position only through unpublished decisions. Br. 27-28. This Court, however, has not excluded consideration of unpublished decisions, because they often "reveal the interpretation put upon the statute by the agency." *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 686 (1962); *see also Boesche* v. *Udall*, 373 U.S. 472, 482-483 (1963) (citing string of unpublished decisions for the proposition that "[f]rom the beginnings of the Mineral Leasing Act the Secretary has conceived that he had the power drawn in question").

Nor is it correct that the Board has "merely" followed binding circuit precedent in applying equitable tolling. Amicus Br. 28. The BIA has frequently found equitable tolling principles applicable where the relevant circuit had no published ruling requiring it, including in this case. Pet. App. 7. Some decisions relied on a now-vacated published decision of the Attorney General that recognized equitable tolling.[6] *See,*

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[6] In *Matter of Compean*, 24 I. & N. Dec. 710, 732 (A.G. 2009), the Attorney General ruled that "in cases where the alien moves to reopen beyond the applicable time limit—typically 90 days from

e.g., *Matter of Diaz*, 2009 WL 2981747 (BIA Aug. 21, 2009) (granting reopening). Other BIA decisions arising in circuits with no controlling law relied either on decisions from other circuits or decisions outside the immigration context. In both instances, the decisions relied upon were persuasive, not binding. For example, in a case from the Fifth Circuit, after noting the absence of binding precedent on point, the BIA assessed the movant's equitable tolling claim based on (persuasive) Second Circuit precedent. *Chavez-Guzman*, 2012 WL 6968959, at *1;[7] *see also*, *e.g.*, *Matter of Torres-Obregon*, 2015 WL 1208089, at *1 (BIA Jan. 29, 2015) (considering equitable tolling request based on decision outside the controlling circuit); *Matter of Cordova-Soto*, 2012 Immig. Rptr. LEXIS 5911 (BIA Sept. 17, 2012) (same); *Matter of* ——, 2008 Immig. Rptr. LEXIS 12133 (BIA May 20, 2008) (finding equitable tolling available before controlling circuit had made that determination, relying on tolling decisions in habeas context).

Accordingly, even if the statute were ambiguous, the BIA's decision to treat the 90-day period as subject to equitable tolling was proper.

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the date the removal order was entered—the Board may exercise its discretion to allow tolling of the 90-day period." That decision was later vacated, *Matter of Compean*, 25 I. & N. Dec. 1, 2 (A.G. 2009), and a new rule addressing motions to reopen based on ineffective assistance of counsel is slated for publication in November (Resp. Br. 25 n.9).

[7] After denying tolling under the statute, the BIA *separately* evaluated whether the motion to reopen could be granted under its *sua sponte* authority. *Chavez-Guzman*, 2012 WL 6968959, at *2.

3. Appellate jurisdiction lies even under Amicus's view that the BIA's application of tolling arises under its *sua sponte* authority

Amicus ultimately concedes that the BIA *may* apply "principles of equitable tolling," but contends that its authority to do so stems not from the statute, but from the regulation allowing reopening *sua sponte*. Br. 35; *see* 8 C.F.R. § 1003.2(a). Even if that conclusion were correct (though it is not), it would still not defeat the court of appeals' jurisdiction to review a denial of equitable tolling on grounds of ineffective assistance of counsel. Whether the source of equitable tolling is statutory or regulatory, the BIA applies a consistent standard that circuit courts have had no difficulty applying on review.

Amicus asserts that courts lack jurisdiction to review any denial of tolling if it is considered an exercise of discretionary authority. Br. 40; *see also* Resp. Br. 35 n.13. But even where Congress has specifically *removed* appellate jurisdiction over discretionary decisions, it was careful to preserve jurisdiction over questions of law. 8 U.S.C. § 1252(a)(2)(D) ("[n]othing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law"). Here, the BIA denied Mr. Mata's request for tolling because it (erroneously) concluded that he was convicted of a crime involving moral turpitude (AR66)—a pure question of law that courts retain jurisdiction to review. *E.g.*, *Hyder* v. *Keisler*, 506 F.3d 388, 390 (5th Cir. 2007) (where BIA denied discretionary relief, "[w]e have jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D) to review the question of law at issue in

this case: whether the BIA properly classified the crime ... as a CIMT"); *see also Pllumi* v. *Holder*, 642 F.3d 155, 160 (3d Cir. 2011) (recognizing jurisdiction to correct an error of law underlying a refusal to reopen proceedings *sua sponte*). Thus, even if tolling were a discretionary action for which Congress had stripped jurisdiction—though it is not—the statute preserves jurisdiction to correct the BIA's legal error here.[8]

Amicus (like the government) asserts, without elaboration, that "no meaningful standards currently permit courts to review the Board's exercise of its *sua sponte* authority." Amicus Br. 38; Resp. Br. 35 n.13. But neither Amicus nor the government explains why applications of long-established *equitable tolling* principles in cases involving *ineffective assistance of counsel*—even if captioned as "*sua sponte*" reopening decisions—involve "no meaningful standards." This Court has often recognized the standard for equitable tolling, *e.g. Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005), and the BIA's *Matter of Lozada* decision provides clear requirements for ineffective assistance claims, 19 I. & N. Dec. 637, 638-639 (1988). These standards are easily reviewable, and frequently reviewed, by courts of appeals. *See* Pet. Br. 21-22 (citing cases). And the BIA has applied the same judicially manageable standards in ineffective assistance cases in the Fifth Circuit, where such cases are considered as arising under the BIA's regulatory *sua sponte* reopening authority. *E.g.*,

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[8] The Fifth Circuit joined other circuits in rejecting the main BIA precedent on which the IJ and BIA relied for the erroneous conclusion that Mr. Mata was convicted of a crime involving moral turpitude. *See* Pet. Br. 7-8 & n.3. Indeed, the Attorney General recently vacated that precedent in its entirety. *Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 550 (A.G. Apr. 10, 2015) (vacating *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008)).

Matter of Hernandez-Rodriguez, 2012 WL 5473671, at *1 (BIA Oct. 25, 2012) (exercising "*sua sponte* authority" to grant untimely motion to reopen because noncitizen complied with *Lozada*'s "requirements for an ineffective assistance of counsel claim" and "suffered prejudice as a result of her former attorney's handling of her case"); *Matter of Benitez*, 2009 WL 3818024, at *1 (BIA Oct. 30, 2009) (denying tolling due to lack of diligence and noncompliance with *Lozada* factors); *see also* Pet. App. 7-8 (BIA decision deciding Mr. Mata's motion to reopen under *Lozada*).

If the BIA's standards are judicially manageable when exercised under the statute—which they clearly are, *see* Pet. Br. 21-22 (citing cases)—it makes no sense to treat the *same* standards as unmanageable when applied under the *sua sponte* regulation. Rather, this would be a situation in which the agency has "announce[d] and follow[ed] ... by settled course of adjudication ... a general policy by which its exercise of discretion will be governed," such that "an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned" by a court. *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996).

There is no reason to think that *Yang* creates "an undesirable incentive for agencies not to explain their exercise of discretionary authority." Amicus Br. 41-42. Instead, *Yang* provides the right incentive because agencies may always change their positions through a rational "avowed alteration" of policy. Where, as here, the agency has developed a settled practice for handling a particular category of claims—requests for eq-

uitable tolling due to ineffective assistance of counsel—its decisions are reviewable based on those principles.[9]

* * *

Congress has provided for judicial review of denials of motions to reopen, including motions that include a request for equitable tolling of the 90-day deadline based on ineffective assistance of counsel. 8 U.S.C. § 1252(a)(1), (b)(6). The Court may answer the question presented with that straightforward jurisdictional ruling. Should the Court choose to go further, it should hold that the 90-day deadline is subject to equitable tolling as a matter of statutory interpretation. In any event, the Court should declare that the Fifth Circuit has jurisdiction to review the BIA's decision and remand Mr. Mata's case for review on the merits.

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[9] Contrary to Amicus's contention (Br. 40 n.10), Petitioner did not suggest otherwise at the petition stage. Petitioner merely noted that he did not take issue with the proposition that, where there is "no meaningful standard" at play, then a *sua sponte* decision is unreviewable. Pet. 6. The BIA's application of settled equitable tolling and ineffective assistance principles does not fall into that category.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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